to the principal case in those decisions unanimously allowing a director who personally owns stock to vote it on the question of ratifying his own voidable act, even when his stock is necessary to a majority, or itself constitutes a majority.[10] And a further example exists in the line of cases refusing to restrain a company owning a majority of the stock of another company from electing its own directors and officers to corresponding positions in the latter company,[11] even though, as shown above, subsequent transactions between the two companies thus having a common directorate will be voidable.[12] In short, though the ratification is voidable like the original contract, the initial right of the plaintiff to avoid the latter rests upon the right of the stockholders to be represented by disinterested directors, and when these stockholders have themselves acted, the plaintiff has no further power. The decision of the principal case, therefore, can be justified only by disregarding the separate existence of the holding company and by treating its stockholders as entitled to a direct voice in the management of the plaintiff corporation.

RIGHT OF A "VOLUNTEER" TO SUBROGATION AS AGAINST INTERVENING INCUMBRANCERS.—When the doctrine of subrogation was first established, it was restricted to sureties, or others who were compelled to pay because of some legal obligation, or in order to protect their own interests, and this gave rise to the maxim, "Subrogation is never granted to a volunteer."[1] With characteristic tenacity to familiar forms, the courts have endeavored to reconcile modern views to this old rule, but in so doing have been compelled, in order to meet the increasing demands for an extension of the subrogatory privilege beyond the limits of the early cases, to distort the word "volunteer" far beyond its original meaning; for this right will now generally be granted except to one who has officiously intermeddled in the affairs of the debtor.[2] Adherence to the old formula is, moreover, responsible for the result in a class of cases which do not logically seem to be governed by the same principles as those from which the rule was deduced. An illustration is afforded by the recent case of *Nelson* v. *McKee* (Ind. 1912) 99 N. E. 447. The plaintiff, who had no interest to protect by so doing, had discharged a mortgage due to a third person at the request of the mortgagor, and had taken a new mortgage at a lower rate of interest, without knowledge of the fact that the defendant had previously acquired a lien on the property by docketing a judgment. The court refused to preserve the discharged mortgage for the purpose of giving the plaintiff priority over the judgment lienor solely because he had acted voluntarily in paying off the first security.[3]

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[10]Northwest Transportation Co. *v.* Beatty (1887) L. R. 12 A. C. 589; U. S. Steel Corp. *v.* Hodge (1902) 64 N. J. Eq. 807; Green *v.* Felton (1908) 42 Ind. App. 675; *contra,* Miner *v.* Ice Co. (1892) 93 Mich. 97.

[11]Bigelow *v.* C. & H. Mining Co. (1909) 167 Fed. 721; see Leavenworth *v.* Chi. etc. Ry. Co. (1890) 134 U. S. 588.

[12]See cases in note 7, *supra.*

[1]See Sheldon, Subrogation, (2nd ed.) § 240 *et seq.*

[2]9 COLUMBIA LAW REVIEW 63; 13 Harv. L. Rev. 297.

[3]Where there is "conventional" subrogation, *i. e.,* an agreement with the debtor for subrogation, the plaintiff will not be held a volunteer. Home Savings Bank *v.* Bierstadt (1897) 168 Ill. 618. Such an agreement may be implied. Gore *v.* Brian (N. J. 1896) 35 Atl. 897. But as the agree-

The decision of the court, while supported by some authority,[4] seems to have no justification. The question of the plaintiff's voluntary payment is indeed the material one when he seeks the right of subrogation for the purpose of making an unwilling debtor of one whose obligation he has paid. But in this case the plaintiff has not only discharged the claim at the debtor's request, but has taken a new and valid mortgage, which, however, will place him in a secondary position, because of the intervening incumbrance, unless through subrogation he can be placed in the position occupied by the first mortgage. The defendant should not be able to defeat the plaintiff's claim to priority on the ground that the payment was voluntary, when the debtor cannot impeach the validity of the obligation itself on that ground, but the determination of priority would seem to depend properly upon considerations of justice as between the plaintiff and the defendant.[5] The plaintiff's equity arises out of mistake, for, as he believed the new mortgage to be the only incumbrance, he clearly intended to receive through it the same priority which the discharged mortgage enjoyed, since with knowledge of the facts he would not willingly have allowed the substitution of an inferior for the superior claim.[6] To grant him the right to subrogation would, to be sure, deprive the defendant of his legal right to priority,[7] but that would appear to be no hardship, for the right has arisen solely because of the plaintiff's mistake.[8] Moreover, the intervening incumbrancer has filed his claim with notice of its secondary character,[9] so that to give the plaintiff priority would only restore the defendant to the position he originally expected to occupy.[10] On the other hand, if the defendant had taken his security on the faith of the cancellation of the prior one, and without notice of the plaintiff's claim to subrogation, it would be obviously unjust to deny him the priority which he expected to receive.[11] By parity of reasoning the right to subrogation is accorded to one who, mistakenly believing that an intervening incumbrance has been cancelled, discharges the former security and takes a new one.[12] Furthermore, the intervening lienor is so little prejudiced by being relegated to his former subordinate position, that

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ment will not be enforced to the prejudice of intervening incumbrances, see Home Savings Bank *v.* Bierstadt *supra,* it would seem that in this as in other cases, the right to subrogation is given only when justice requires it, and that the sole function of the contract is to show that the plaintiff is not an intermeddler in the affairs of the debtor.

[4]Bohn etc. Co. *v.* Case (1894) 42 Neb. 281; Banta *v.* Garmo (N. Y. 1844) 1 Sandf. Ch. 383; Downer *v.* Wilson (1860) 33 Vt. 1; Wilkins *v.* Gibson (1901) 113 Ga. 31.

[5]See Thompson *v.* Conn. etc. Co. (1894) 139 Ind. 325; Union etc. Co. *v.* Peters (1895) 72 Miss. 1058.

[6]Bruse *v.* Nelson (1872) 35 Ia. 157; Barnes *v.* Mott (1876) 64 N. Y. 397.

[7]Rice *v.* Winters (1895) 45 Neb. 517.

[8]Bruse *v.* Nelson *supra;* Thompson *v.* Conn. etc. Co. *supra.*

[9]Indeed, if the intervening lienor had been a mortgagee, he would actually have contracted to occupy a junior position. See Union etc. Co. *v.* Peters *supra.*

[10]George *v.* Butler (1897) 16 Utah 111; Straman *v.* Rechtine (1898) 58 Oh. St. 443; *cf.* Sears *v.* Patterson (1893) 54 Mo. App. 278.

[11]Coonrod *v.* Kelly (1902) 119 Fed. 841.

[12]Thompson *v.* Conn. etc. Co. *supra.* This is true even after the foreclosure of an intervening incumbrance. London etc. Co. *v.* Tracy (1894) 58 Minn. 201.

constructive notice of his claim will not defeat the right of one seeking subrogation,[13] unless the latter has failed to exercise due care in examining the records.[14]

The majority of courts have ostensibly determined the right to priority of one seeking subrogation by deciding whether he is a volunteer,[15] but they have not considered him one because of his voluntary payment of the debtor's obligation, but because under the circumstances he was not justly entitled to the privilege.[16] The rule refusing subrogation to a volunteer is therefore useless, as well as without logical foundation, in cases similar to the principal one, and should not be used as a basis for denying the plaintiff that priority to which the court conceded he would have been justly entitled if his payment had not been voluntary.[17]

DOUBLE JEOPARDY AS APPLIED TO TWO ACTS INCLUDED IN THE SAME TRANSACTION.—It is obvious that a plea of double jeopardy will be valid only when a second indictment charges an offense identical in law and fact with that for which the defendant was formerly tried.[1] Many difficulties, however, have been experienced in the application of this rule to particular facts. Thus a situation which has produced varied results is presented by the recent case of *Munson* v. *M'Claughry* (1912) 198 Fed. 72. The defendant was tried upon an indictment consisting of two counts, one alleging a breaking and entering into a post-office with intent to steal, and the second a larceny committed within. He was convicted and sentenced upon both counts, and, after serving his sentence for the burglary, sued out a writ of Habeas Corpus for his release from the penitentiary, claiming that the conviction for larceny violated the Constitutional provision against double jeopardy. The court sustained this contention, arguing that as both offenses were part of the same transaction, to punish them as separable crimes would amount to a two-fold punishment of the same criminal intent.

Although this view finds some support among the authorities, it has been repudiated in the majority of cases.[2] The test generally employed

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[13]Home Savings Bank *v.* Bierstadt *supra;* Emmert *v.* Thompson (1892) 49 Minn. 386.

[14]Fort Dodge etc. Ass. *v.* Scott (1892) 86 Ia. 431; *cf.* Rice *v.* Winters *supra.*

[15]But see Bruse *v.* Nelson *supra;* Emmert *v.* Thompson *supra.*

[16]So when the defendant has fraudulently induced the plaintiff to accept a substituted security in order that his own intervening incumbrance may then obtain priority, the plaintiff will be entitled to subrogation. Short *v.* Currier (1891) 153 Mass. 182; Waldo *v.* Richmond (1879) 40 Mich. 380.

[17]A Nebraska court similarly felt that adherence to a maxim of equity jurisdiction should be more determinative of the result than considerations of the "natural and inherent" justice of the case. Bohn etc Co. *v.* Case *supra.*

[1]4 Bl. Comm. 336. In Commonwealth *v.* Roby (Mass. 1832) 12 Pick. 496, 504, it is said: "The plea will be vicious if the offences, charged in the two indictments, be perfectly distinct in point of law, however nearly they may be connected in fact * * *."

[2]Sharp *v.* State (1901) 61 Neb. 187; State *v.* Ingalls (1896) 98 Ia. 728; *Ex parte* Peters (1880) 12 Fed. 461; Territory *v.* Willard (1889) 8 Mont. 328; People *v.* Parrow (1890) 80 Mich. 567; Bishop, New Criminal Law, § 1062. By statute, the same result has been reached in Texas, Missouri and Arkansas. See Howard *v.* State (1880) 8 Tex. App. 447; State *v.* Martin (1882) 76 Mo. 337; Dodd *v.* State (1878) 33 Ark. 517.